No. 14,883

IN THE

United States Court of Appeals

For the Ninth Circuit

LEON D. URBAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Statutes

Miscellaneous

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JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE.

The appellant, Leon D. Urban, was at the Alibi Club in the early morning hours of January 22, 1955.

The Alibi Club was a small bar located in the south part of Fairbanks, Alaska. The appellant and the deceased, Myrtle Patricia Cathey, who were living together as though they were married, were joint liquor licensees of the Alibi Club at the time.

That morning the appellant went over to the Players Club, knowing that the deceased was there. The Players Club was another bar, approximately one mile closer into the City of Fairbanks, Alaska. Upon arrival, the appellant had "a few words" with the deceased and then proceeded to remove her forcibly from the Players Club. (Tr. 167-170, 174-183, 224-234). The appellant then placed the deceased in the back seat of a taxicab and proceeded to beat her in the course of the return trip to the Alibi Club (Tr. 189-220). Upon arrival, appellant pulled the deceased from the cab into the bar by the hair of her head (Tr. 192, 197, 198, 210, 212).

After the appellant apparently made some effort to take the deceased to the hospital later that day (Tr. 481-490), he called a doctor. Doctor Harvey W. Anderson went to the Alibi Club, examined the deceased and treated her (Tr. 57-63). Doctor Anderson was again called to the Alibi Club to treat the deceased on Sunday evening, January 30, 1955 (Tr. 59). The doctor ordered the deceased hospitalized, and the deceased expired at 1:30 a.m. on January 31, 1955 (Tr. 121, 128). Dr. Anderson performed an autopsy on the deceased later that day and determined the cause of her death (Tr. 46, 48, 50, 51, 55, 94, 95). This was directly connected with a beating.

Rose McGraw and Frank Meyers stated that they were in the Alibi Club during the week of January 24 through January 29 and heard the deceased moaning in the bedroom (Tr. 187, 253). The appellant explained that the club was closed earlier that week because he and the deceased had the stomach flu (Tr. 186). The door to the bedroom was observed to be locked from the outside on one of these occasions (Tr. 255). Other witnesses, on rebuttal, testified much in line with the testimony of McGraw and Meyers (Tr. 597-601, 601-606, 613-617, 617-626). Meyers also testified to a former assault upon the deceased by the appellant, earlier in the month of January at the Club Alibi. This was admitted only as demonstrating the state of mind of the appellant (Tr. 248).

The parka that belonged to the deceased was admitted into evidence (Government's Exhibit "H") as was the sweater of the deceased (Government's Exhibit "I"). These items were picked up by a dry cleaner from the Alibi Club on January 26 (Tr. 258-264, 280) and tagged by number and with the appellant's name entered of record (Tr. 274-279). Blood was observed on the parka at the time (Tr. 260, 268, 281-283) as well as on the sweater (Tr. 281). Don McVeigh, owner of the cleaning plant, cleaned the garments and soon thereafter they were returned to the Alibi Club (Tr. 281, 282, 261, 262).

Various inconsistent accounts regarding the deceased were related by the appellant after her death. These included an explanation of her injuries to William B. DeWalt, Fairbanks City Police Officer, who

accompanied the ambulance to the hospital on January 30 (Tr. 153-159), to the nurses at the hospital (Tr. 118-126, 126-130). Also, to Donald Byrum, another city police officer (Tr. 160-165), to Francis X. Wirth, Jr., a third city police officer (Tr. 301-311), to James J. Goodfellow, a Territorial Police Officer (Tr. 285-301), and to E. L. Mayfield, acting officer-in-charge of the Fairbanks detachment of Territorial Police (Tr. 317-333).

Dr. Anderson was not asked any questions as to whether or not the deceased had been dragged by the hair of her head (Tr. 38-117). Dr. Paul B. Hagglund, an orthopedic surgeon, in rebuttal did not agree with Dr. Henry Storres (Tr. 569-577) as Dr. Hagglund stated that there would not necessarily be any superficial evidence concerning the scalp of a person dragged by the hair of their head, as was the deceased (Tr. 630-638).

The appellant was indicted for murder in the first degree in violation of Section 65-4-1 of the Alaska Compiled Laws Annotated, 1949, as stated on page 2 of appellant's counsel's brief. However, at the close of the case, but before the jury was given its instructions, the government moved to dismiss the aforesaid charge, and to submit the case to the jury on the charge of second degree murder (Tr. 691-695). This motion was granted by the trial Court and the jury was so instructed (Tr. 696). The jury convicted the appellant of the lesser offense of manslaughter. Appellant then moved for a new trial, which was denied, and he then appealed to this Court.

QUESTIONS PRESENTED.

Appellant has limited the questions presented in this appeal to three specific points set forth on page 2 of his brief. They are: (1) That the trial Court erred in denying his motion for a judgment of acquittal at the close of the government's case and at the close of all the evidence. The particular ground for both of these motions was that there was a total failure of proof as to the essential elements of the crime charged. (2) That the trial Court erred in admitting into evidence enlarged pictures of the body of the deceased (Government's Exhibits "A" through "F") over the objection of the defendant-appellant. (3) That the trial Court erred in refusing to instruct the jury regarding circumstantial evidence, at the request of the appellant.

ARGUMENT.

I.

APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE AND AT THE CLOSE OF ALL THE EVIDENCE WAS PROPERLY DENIED.

Sherry Yendes took the appellant to the Players Club in the early morning hours of January 22, 1955. When the appellant asked Pat Cathey, the deceased, to come home, and she would not, Yendes *saw* the appellant grab the deceased by the arm and *heard* him call her a "bitch" (Tr. 167, 168). James J. Murray, a patron in the Players Club at that time, heard a commotion and *saw* the deceased on the floor of the bar, with a man standing behind her bending over her

(Tr. 224-234). George E. Haritos, another patron who was standing near Murray in the bar at the time, *saw* the deceased abruptly leave the bar and attempt to return, only to be thwarted. Haritos, who had seen the deceased for some forty-five minutes in the bar and who had been sitting next to her and had bought her "a drink" stated that there was nothing wrong with her physical appearance prior to her untimely exit from the bar. When she left the bar, Haritos went outside to *see* a taxicab pull away, with somebody beating the deceased in the back seat (Tr. 174-183). (Emphasis supplied).

Marvin T. Jennings, driver of that cab, did not pay any particular attention to the deceased when she entered with the appellant except to help slide her across the back seat. However, he *heard* the appellant hit her several times and Jennings testified that the appellant knocked her down on the floorboard of the cab, picked her up, and knocked her against the cab door (Tr. 191, 195, 200-203, 204). This took place in the course of a five minute ride to the Club Alibi, which was approximately one mile distant. The appellant, the deceased, and Jennings were the only occupants of the cab. Upon arrival at the Club Alibi, Jennings stated that he *saw* the deceased slumped on the back seat (Tr. 212), and that he *saw* blood on her face (apparently from her nose) and on down her clothes (Tr. 192, 196) and on the seat of the cab, and that she appeared to be passed out (Tr. 193). Also, that he *saw* the appellant get out of the cab, unlock the door to the Club Alibi, and drag the deceased some

ten feet into the building by the hair of her head, with her feet dangling behind her (Tr. 192, 197, 198, 210, 212). This occurred at approximately 4:00 a.m. on the morning of January 22, 1955. (Emphasis supplied.)

Dr. Harvey W. Anderson, who responded to the appellant's call to the Club Alibi on the evening of January 22, found the deceased to be under the influence of alcohol, with stale cuts on her lips but with gross swelling of both cheek regions, a small cut on her nose, and a bruise behind her left ear (Tr. 57, 63-65). These were of a bluish color and not too evident (Tr. 60, 93). Dr. Anderson considered these bruises to be recent—within a twenty-four hour period (Tr. 93). After treating the deceased, Dr. Anderson told the appellant to call if he thought she needed further treatment (Tr. 58, 63). The appellant did not call until Sunday evening, January 30, however. Again going to the Club Alibi, Dr. Anderson saw the deceased in the same bedroom near the bar proper, and immediately noted signs of a serious brain injury. An ambulance was promptly called and the deceased was removed to the hospital (Tr. 59). Dr. Anderson stated that he also noticed that the various skin discolorations, previously mentioned, had a darker, "more purplish" color at that time (Tr. 59).

The deceased expired at approximately 1:30 a.m. on January 31, 1955, (Tr. 121, 128). Dr. Anderson performed the autopsy in the afternoon of January 31 at request of U. S. Commissioner La Dessa Nordale. From this, Dr. Anderson determined that the cause of death was from a brain injury as evidenced by

subdural hematoma (Tr. 46), which was the result of external injuries about the face and head, behind the ears, and to the temporalis muscles of the head of the deceased (Tr. 48, 49, 98); further, that the injuries resulted from blows to this region from a fist "or blunt object" (Tr. 50, 51, 98). Dr. Anderson discounted any possible spontaneous hemhorrhages in this instance (Tr. 55, 94), and stated that the hemhorrhage on the brain in this case was anywhere "from several days to a week or two weeks old" at the time of the autopsy (Tr. 90). This testimony had a direct relation to the conduct of the appellant concerning the deceased on January 22, 1955.

If the appellant purposely and maliciously killed the deceased he could have been found guilty of second degree murder, under the Alaskan statute (A.C.L.A., 1949, Section 65-4-3). If the appellant unlawfully killed the deceased he could have been found guilty of manslaughter, under the Alaskan statute (A.C.L.A., 1949, Section 65-4-4), as he was in this case.

Throughout the trial the government contended that, while normally the requisite intent to kill or do great bodily harm, and the requisite malice may not be inferred from a beating with the fists alone, still a situation can exist (and did exist in this case) where both the aforesaid intent and malice could be implied from such acts and from the particular circumstances of the case and, as such, would be a question of fact for the jury. *(People v. Crenshaw,* 131 N.E. 576, 578 (Sup. Ct. Ill., 1921); *McAndrews v. People,* 208 P. 486 (Sup.

Ct. Col., 1922); *Milosevich v. People,* 199 P. 2d 895, 897 (Sup. Ct. Col., 1948).) Here, considering the deceased to be a woman (5 ft. 6 in. tall, 150 lbs. weight) and the appellant to be a man (6 ft. tall, 200 lbs. weight) of powerful build, coupled with the amount of violence involved in taking the deceased from the Players Club to the Club Abili, supra, the requisite intent and malice, to establish the charge of second degree murder, can be inferred from the circumstances. *(Commonwealth v. Buzard,* 76 A. 2d 394, (Sup. Ct. Pa., 1950); *Commonwealth v. Lisowski,* 117 A. 794, (Sup. Ct. Pa., 1922); *Commonwealth v Dorasio,* 74 A. 2d 125, 130 Sup. Ct. Pa., 1950).) Certainly then, the evidence is sufficient to sustain a conviction of manslaughter, where the aforesaid intent and malice are not necessary elements.

Frank Meyers testified to a former assault upon the deceased, by the appellant, earlier in the month of January, 1955, in the Club Alibi. This testimony was admitted by the trial Court only as demonstrating the state of mind of the defendant (Tr. 248). *(State v. Rediker,* 8 N.W. 2d 527, 533 (Sup. Ct. Minn., 1943); *State v. Justice,* 71 P. 2d 798 (Sup. Ct. Ore., 1937); *People v. Palassou,* 111 P. 109, 110 (Ct. of Appeals, Calif., 1910); Wharton's Criminal Evidence, 11th Ed., Section 353).)

As appellant has stated on page 12 of his brief, the trial Court instructed as to direct and circumstantial evidence, stating, amongst other things, ". . . The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required

for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions" (Tr. 669).

The trial Court also instructed, as follows:

> "(16) Evidence was offered in this case for the purpose of showing that the defendant committed assaults on Myrtle Patricia Cathey prior to the date of the assault alleged in the indictment.
>
> "Such evidence was received for a limited purpose only; not to prove distinct offenses or continual criminality, but for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the offense of murder in the first degree or the included offense of murder in the second degree.
>
> "You are not permitted to consider that evidence for any other purpose, and as to that purpose you must weigh such evidence as you do all other in the case.
>
> "The value, if any, of such evidence depends on whether or not it tends to show that the defendant entertained the intent which is a necessary element of the alleged crime of murder in the first degree, or the included offense of murder in the second degree, as pointed out in other of my instructions" (Tr. 670).

The appellant has not taken an appeal from the judgment, but from a denial of the motion for judgment of acquittal. In *Henderson v. United States,* 143 F. 2d 681 (9 Cir. 1944), this Court said:

"(1) It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorable to the prosecution." (Id., p. 682).

Considering the evidence in the light most favorable to the government *(Woodard Laboratories v. United States,* 198 F. 2d 995, 998 (9 Cir. 1952); *Schino v. United States,* 209 F. 2d 67, 72 (9 Cir. 1953), cert. denied, 347 U.S. 937 (1954); *Bateman v. United States,* 212 F. 2d 61, 70 (9 Cir. 1954)) it is sufficient to sustain the jury's verdict.

II.

THE ADMISSION IN EVIDENCE OF THE ENLARGED PICTURES OF THE BODY OF THE DECEASED DID NOT SUBSTANTIALLY PREJUDICE THE APPELLANT.

James G. Goodfellow, a Territorial Police Officer with two and three-quarters years experience, testified that he took the six pictures (Government's Exhibit "G") of the deceased in the afternoon of January 31, 1955, at the funeral home in Fairbanks, Alaska, and that he did so in the course of his official duties, using a four by five graflex camera which belonged to the police. He also stated that each enlargement (Government's Exhibits "A" through "F") fairly represented the condition of the particular portion of the body at the time that Goodfellow viewed it (Tr. 30-36).

James L. Douthit, a professional photographer for six years employed by a local Fairbanks newspaper, stated that he enlarged Government's Exhibits "A" through "F" from negatives given him by Lieutenant Trafton of the Territorial Police. Douthit stated that any distortion appearing in the enlargements would be so small that it couldn't be measured, and that it would be normal for such a process. He also testified that each enlargement was a fair reproduction of the print from the negative (Tr. 130-135).

Government's Exhibits "A" through "F" were offered and received into evidence for the purpose of establishing identity and also the character of the wounds of the deceased (Tr. 135). The small, regular sized contact prints were offered into evidence for the purpose of comparison, and were received without objection from the appellant (Tr. 136). Later, the appellant's attorney moved to strike the exhibits ("A" through "F"). Argument was had and the trial Court denied the motion (Tr. 438).

In *State v. Hause,* 130 A. 743, (Sup. Ct. N.H., 1925) photographs were taken of the head of the deceased, and the enlargements were offered into evidence and objected to as being distorted. On appeal, the Court said:

> "(6) Respecting the relevancy of the photographs, it may be said that they would seem relevant for their bearing on the nature and degree of the crime and on the respondent's purpose and mental state, as well as to aid in making clear the oral testimony about the injuries. . . .

"(8) If the stated ground of distortion implied a general ground of prejudice, whether they were unduly prejudicial or not was a question of fact to be determined in the court's discretion. . . . It is not to be assumed that the photographs were red flags necessarily arousing the jury's passions and a will to avenge. Since they were relevant, their probable importance was to be compared with their probable prejudicial effect on the inquiry whether they would do more good than harm, and the finding that they would is a reasonable one. . . ." (Id, p. 744)

As to the purpose of establishing identity, in *Vaughn v. State,* 183 So. 428 (Sup. Ct. Ala., 1938) in discussing the defendant's contention that the use of a photograph of the deceased, properly identified, was error prejudicial, and immaterial to any issue in the case, the Court stated:

"The photograph, not here produced, had a legitimate place as a matter of identification, and it was also referred to by witness McDaniel for identification and witness Parker, who had never known deceased, identified her from the photograph as the woman he saw at Greenwood's on the fatal night. The objection to the introduction of the photograph was properly overruled." (Id., p. 430). See also *Wilson v. United States,* 162 U.S. 613 (U.S. Sup. Ct., 1896)

And as bearing on the question of the nature of the wounds, in the case of *State v. Lantzer,* 99 P. 2d 73 (Sup. Ct. Wyo., 1940) the Court stated:

"We assume that photographs should be excluded when they do not tend to prove any controverted fact, but have a tendency to create unfair prejudice, on the same principle that, under like circumstances, authorizes or requires the exclusion of bloody clothing of the deceased, or instruments used by defendant in committing the crime. . . . The photographs in question merely gave the jury a better description than could have been given by words. They cannot be characterized as gruesome or inflammatory. The body of the dead woman lay on its back hiding the wound and blood. We cannot hold that the photographs had such a tendency to create unfair prejudice that it was the duty of the court to exclude them from the evidence." (Id. p. 78)

To a like effect is *People v. Smith,* 104 P. 2d 510 (Sup. Ct. Cal., 1940) wherein four photographs of the deceased's body as seen shortly after the homicide and photographed from different angles, were admitted into evidence. On appeal, the Court said:

"The condition of the body . . . . . had been described by several witnesses, and the photographs merely portrayed facts which the jury was entitled to have placed before it. They possessed evidentiary value and tended to clarify the evidence theretofore presented by several witnesses concerning the position of the body in its relation to the gun and the other pertinent objects found on the floor after the homicide. The admission in evidence of the photographs was within the trial

court's discretion, and clearly was not erroneous. . . ." (Id., p. 515)

III.

INSTRUCTION OF THE TRIAL COURT REGARDING THE LAW OF CIRCUMSTANTIAL EVIDENCE WAS ADEQUATE.

In this case, the Court instructed as to direct and circumstantial evidence, as stated on page 29 of appellent's brief. The Court also instructed as to reasonable doubt, as follows:

"(14) The law does not require the defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the prosecution to establish his guilt by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure. It is an essential, substantial part of the law and is binding on you in this case.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the prosecution to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding convic-

tion of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." (Tr. 668-669)

There was no objection to this instruction on the part of the appellant (Tr. 677-681).

In *Karn v. United States,* 158 F. 2d 568 (9 Cir. 1946) this Court said:

"The prosecution relied *entirely* upon circumstantial evidence for a conviction. It is sufficient to say *that under such circumstances* the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis, but that of guilt. 23 C.J.S. Criminal Law, (Section) 907, pp. 151, 152; *Paddock v. United States,* (9 Cir. 1935), 79 F. 2d 872, 876; *Ferris v. United States* (9 Cir. 1930), 40 F. 2d 837, 840. Our considered judgment is that the evidence in this case falls short of meeting this exacting standard." (Id., p. 570) (Emphasis supplied)

In *McCoy v. United States,* 169 F. 2d 776 (9 Cir. 1948), however, where both direct and circumstantial evidence existed and where the trial Court refused to give appellant's specific instruction of circumstantial evidence, this Court said:

> ". . . Much evidence, which, with its recital, would be classed as direct evidence, upon closer observation turns out to be circumstantial in character. Events occur so often in pattern that we accept them as direct evidence of a fact proved, whereas they are only facts which habitually accompany the fact we deem proved. Any rule for the special treatment of evidence upon the basis of its character, direct or circumstantial, is bound to be difficult of correct application. And too, any instruction to a jury directing a different treatment for circumstantial evidence that is to be accorded direct evidence will, if heeded at all, tend to confusion and incite in the juror's mind the too prevalent and persistent illusion that circumstantial evidence is inferior to direct evidence . . . The books are full of judicial discord through attempts to distinguish between direct and circumstantial evidence in jury instructions." (Id. pp. 784, 785)

In commenting on the trial Court's general instruction of this subject, this Court said:

> "A single circumstance, standing alone, with the realm of the possible, can usually be accounted for upon an innocent basis. But the jury is charged with making all of its conclusions upon the basis of what is reasonable and at every turn under the

admonition that the accused is presumed to be innocent and under the necessity of declining to find guilt until the proof convinces beyond a reasonable doubt. The instruction quoted fits all the evidence of facts into an integrated whole, and when this has been done and the jury's verdict is guilty, the jury has found that no other determination could be reasonable. That a hiatus exists here whereby the evidence may reasonable be held not to be inconsistent with some hypothesis of fact other than guilt is faulty reasoning." (Id., p. 786)

And in *Schino v. United States,* 209 F. 2d 67 (9 Cir. 1953), cert. denied, 347 U.S. 937 (1954) this Court said:

"Appellants each assert that, as to himself, the evidence is insufficient to support the verdict. In determining this question, we must consider the evidence in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 68, 62 S.Ct. 457, 86 L. Ed. 680; Woodard Laboratories v. United States, 9 Cir., 198 F. 2d 995. Viewed in this light, the states of the evidence is such that a juror's reasonable mind 'could find that the evidence excludes every reasonable hypothesis but that of guilt.' In such a situation, the case must be submitted to the jury, and their decision is final. Remmer v. United States, 9 Cir., 205 F. 2d 277, 287-288, and cases cited. *The theory upon which appellants rely, that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence as with guilt, has been laid to rest in this circuit by the Remmer case, at least where, as here, the*

question arises on a motion for a judgment of acquittal." (Id., p. 72) (Emphasis supplied)

In this case, where both direct and circumstantial evidence are prevalent, the following is important:

"Petitioners press upon us, finally, the contention that the instructions of the trial court were so erroneous and misleading as to constitute grounds for reversal. We have carefully reviewed the instructions and cannot agree. But some require comment. The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, Garst v. United States, 180 F. 339, 343; Anderson v. United States, 30 F. 2d 485-487; Stutz v. United States, 47 F. 2d 1029, 1030; Hanson v. United States, 208 F. 2d 914, 916, *but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an addition instruction on circumstantial evidence is confusing and incorrect,* United States v. Austin-Bagley Corp., 31 F. 2d 229, 234, cert. denied, 279 U.S. 863; United States v. Becker, 62 F. 2d 1007, 1010; 1 Wigmore, Evidence (3d ed.), (Sections) 25-26.

Circumstantial evidence in this respect is intrinsically no different from testimonial evidence, Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury

is convinced beyond a reasonable doubt, we can require no more." (Id., pp. 139, 140) (Emphasis supplied)

CONCLUSION.

For the reasons set forth above, appellee requests this Court to affirm the judgment of the Court below.

Dated. Fairbanks, Alaska,
June 18, 1956.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

ALASKA COMPILED LAWS ANNOTATED, 1949.

§65-4-1. *First degree murder.* That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.

§65-4-3. *Second degree murder.* That whoever purposely and maliciously, except as provided in the last two sections, kills another, is guilty of murder in the second degree, and shall be imprisoned in the penitentiary not less than fifteen years.

§65-4-4. *Manslaughter.* That whoever unlawfully kills another, except as provided in the last three sections, is guilty of manslaughter, and shall be imprisoned in the penitentiary not more than twenty nor less than one year.